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SUPREME COURT

No. 73-1189

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES FREDERICK CHURCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the warrantless search of his automobile incident to his arrest was unreasonable.

Following a non-jury trial in the United States District Court for the Southern District of California, petitioner was convicted of having possessed 477 pounds of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprisonment, followed by a special parole term of two years. The court of appeals affirmed (Pet. App.).

The pertinent facts are undisputed. On December 6, 1972, at approximately 5:00 a.m., agents of the United States Border Patrol and the United States Customs Service established a surveillance of the Wisteria Check

area of the All-American Canal,[1] where marijuana and alien smuggling frequently occurred. At approximately 6:00 a.m., an individual, who quickly disappeared when a passing truck approached, was observed on the Check. The agents then observed two men enter the Check and unlock the gate to the bridge which crossed the Canal at that point. At the same time, four automobiles crossed the Canal and proceeded north. One of the agents maintained a visual surveillance of the four automobiles, until the automobiles separated at a point some fifteen minutes by automobile from El Centro, California. The agent continued to follow two of the automobiles toward El Centro.

When the agent subsequently lost sight of these two automobiles, additional surveillance units were dispatched to El Centro to regain contact. Two parked vehicles, recognized as having been among those observed earlier on the Check, were located in downtown El Centro. At approximately 6:50 a.m. surveillance of these vehicles was resumed, and, shortly thereafter, several agents approached the vehicles, detected the odor of marijuana emanating from them and observed a kilo brick of marijuana in plain view inside the vehicle in which petitioner was later arrested.

Three of the agents thereafter continued the surveillance. Neither of the vehicles was approached or moved until, at 11:00 a.m., petitioner entered one of the automobiles and drove away, followed by the agents. He drove

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[1]The All-American Canal parallels the Mexican-American border for two to three miles east of the Wisteria Check and for several miles west of the Check. The Wisteria Check area of the Canal is located 100 feet from the Mexican-American border and approximately three and one-half miles from Calexico, California. Dirt roads lead south from the Check into Mexico; another road extends from Mexicali to the Check and beyond.

to a nearby motel, where he remained for approximately forty minutes. He then drove out of El Centro and was thereupon stopped and arrested by the agents. As the agents approached the automobile, they again detected the odor of marijuana. The seizure of 217 kilos of marijuana followed an immediate search of the vehicle.

Petitioner's challenge to the validity of the post-arrest search of the automobile is without merit. At the time of his arrest there was probable cause to search the vehicle, and, under the holding in *Chambers* v. *Maroney*, 399 U.S. 42, the law enforcement officers were not required to obtain a warrant. The fact that they had probable cause to search the vehicle before petitioner entered it and did not obtain a warrant is immaterial. As Judge Duniway observed in his concurring opinion (Pet. App. 9-10):

> I think it entirely proper, when officers know, or have probable cause to believe, that a vehicle contains contraband, for them to use it as bait to catch the criminals. Doing so is good police work and violates no rights. When, * * * in this case, the car has been left in a public place, and the criminals may at any time appear and drive it away, I think that exigent circumstances permit an immediate search. However, such a search is not required. The officers may well conclude that they might be discovered while searching, and lose their quarry. So, if they choose, they can wait for their quarry to appear without searching. When the quarry does appear, enter the car and drive off, an arrest can be made and the car searched—with a warrant if one has been obtained, without one if the circumstances *at that time* bring the case within one of the exceptions to the warrant requirement.

Under these circumstances, it is unnecessary to hold this case pending the determination of *Cardwell* v. *Lewis*, No. 72-1603, argued March 18, 1973, involving the issue, *inter alia*, whether a warrant is ever necessary to search a vehicle which law enforcement officers have probable cause to believe contains evidence of a crime or contraband.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.